WONG LOY FATT & ANOR v. LIM TOK YEW

HIGH COURT MALAYA, IPOH
SM KOMATHY SUPPIAH JC
[CIVIL APPEAL NO: 11BNCVC-49-11-2014]
15 APRIL 2015

CIVIL PROCEDURE: *Pleadings – Counterclaim – Whether separate action – Counterclaim not connected with or related to subject matter of claim – Whether area of dispute would be enlarged and complicate proceedings – Whether counterclaim fell within O. 15 r. 2(1) Rules of Court 2012 – Whether subjected to court's jurisdiction under O. 15 r. 5(2) Rules of Court 2012 – Whether counterclaims ought to be maintained*

CIVIL PROCEDURE: *Jurisdiction – Magistrate – Power to grant declaratory relief – Whether only Sessions Court Judge empowered to grant declaratory relief – Subordinate Courts Act 1948, s. 90*

The plaintiff commenced this action in the Magistrate's Court against the first and second defendants to recover a friendly loan in the sum of RM43,000 that was allegedly advanced to them. It was further alleged that the said sum had not been repaid despite numerous reminders. By a defence and counterclaim, the first and second defendants denied liability for the sum claimed *vide* the counterclaim, the first defendant sought a declaration that he was the rightful owner of a motorcar registered in the plaintiff's name and for an order that the plaintiff transfer the said vehicle to him. On the other hand, the counterclaim of the second defendant, was for unpaid salary for the month of December 2013 amounting to RM2,500 that the plaintiff had failed to pay when the second defendant refused to continue helping the plaintiff run her kindergarten. The said counterclaims prompted an application on the part of the plaintiff to strike it out under O. 18 r. 19(1) of the Rules of Court 2012 ('ROC') on the grounds that (i) the counterclaim was unmaintainable as it was not connected to the claim and had no bearing on it; and (ii) the Magistrate had no power to grant the declaratory relief sought by the first defendant in his counterclaim. The Magistrate ruled that under O. 15 r. 2(1) of the ROC, a counterclaim could only be maintained if it was the same nature as the original action and allowed the application to strike out the counterclaims. Hence, this appeal.

Held (allowing appeal with costs):

(1) A counterclaim is in substance a separate action. A reading of O. 15 r. 2(1) of the ROC shows that it permits a defendant to bring a counterclaim against any one or more of the plaintiffs in any action for any relief. It expressly provides that the subject matter of the counterclaim need not be of the same nature as the original action or even allied to it. (para 10)

(2) Order 15 r. 5(2) of the ROC provides a safeguard against any misuse of this procedure by the bringing of multiple counterclaims. The overriding discretionary jurisdiction conferred by O. 15 r. 5(2), to which O. 15 r. 2(1) expressly made subject, affords the court the ultimate say in what should or should not proceed by way of counterclaim. If the court is of the view that the subject matter of the counterclaim ought to be disposed by a separate action, the court may disallow the inclusion of the counterclaim. (para 11)

(3) The counterclaim of the first and second defendant fell within O. 15 r. 2(1) of the ROC, but was subjected to the exercise by the court of its jurisdiction under r. 5(2). If the present counterclaim was allowed to stand, there would be a counterclaim against the plaintiff by the defendants which had no connection with the original action. The area of dispute between the parties would be greatly enlarged and has the prospect of making proceedings complicated, therefore increasing the length of the hearing. The enlargement of the scope of the proceedings in these various ways was clearly undesirable and was an important objection to allowing the counterclaim to stand. (para 19)

(4) The two counterclaims of the first and second defendants ought not to be maintained unless it was shown to be, as regards the relief it claimed, sufficiently connected with or allied to the subject matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. This court was at a loss to see how the subject matter of the counterclaim, which was a claim in respect of a motor vehicle and unpaid salary, had any material bearing at all on the subject matter of the claim, which was simply a claim for money lent. (para 20)

(5) Section 90 of the Subordinate Courts Act 1948 clearly illustrates that the plaintiff was correct in the position she took as regards the jurisdiction of a first class Magistrate to grant declaratory relief. It was only a Sessions Judge who is empowered to grant declaratory relief. (para 22)

Case(s) referred to:

Alloy Consolidated Sdn Bhd & Anor v. Anjaria Properties Sdn Bhd & Anor And Another Appeal [2011] 5 CLJ 720 CA ***(refd)***

Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd [1972] 1 LNS 31 HC ***(refd)***

Tetuan LM Ong & Co v. Chia Kah Gek [2010] 6 CLJ 268 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 15 rr. 2(1), 3(1), 5(2) O. 18 r. 19(1)
Rules of the High Court 1980, O. 14A
Subordinate Courts Act 1948, ss. 65(5), 90

For the appellants - Awtar Kaur Chain Singh; M/s KL Choy & Co
For the respondent - M Yunus Ali (Noor Shafarin Abdullah with him); M/s Yunus Ali & Kam

Reported by Suhainah Wahiduddin

JUDGMENT

SM Komathy Suppiah JC:

[1] This appeal raises the question of whether O. 15 r. 2(1) of the Rules of Court 2012 ("ROC") permits a defendant to raise a counterclaim that is not connected with or related to the subject matter of the claim.

The Facts

[2] The facts in so far as this appeal is concerned are not in dispute. The plaintiff (the respondent here) and the second defendant (the second appellant here) are siblings and the first defendant (the first appellant here) is the husband of the second defendant.

[3] The plaintiff owned and operated a kindergarten called Tadika Idamanku. She sought the assistance of the second defendant to run it for her. Sometime in January 2014, the second defendant quit her position in the kindergarten due to a misunderstanding between the sisters. The second defendant then started a kindergarten of her own.

[4] In April 2014, the plaintiff commenced this action in the Ipoh Magistrate's Court against the first and second defendants to recover a friendly loan of RM43,000 that was allegedly advanced to them. It was alleged that the said sum has not been repaid despite numerous reminders to do so.

[5] By a defence and counterclaim dated 10 July 2014, the first and second defendants denied liability for the sum claimed. By his counterclaim, the first defendant sought a declaration that he was the rightful owner of a motorcar bearing registration number WGE 6813 registered in the plaintiff's name and for an order that the plaintiff transfers the said vehicle to him. It was alleged that the motorcar had been purchased in the plaintiff's name as the first defendant could not obtain hire purchase facilities in his own name. He paid the monthly instalments and the car remained in his possession. The plaintiff, however, refused to transfer the vehicle to him after all payments due under the hire purchase agreement had been settled.

[6] The counterclaim of the second defendant, on the other hand, was for unpaid salary for the month of December 2013 amounting to RM2,500. It was alleged that the plaintiff had refused to pay her December salary when she refused to continue helping her run Tadika Idamanku.

[7] That counterclaim of the first and second defendants prompted an application on the part of the plaintiff to strike it out under O. 18 r. 19(1) of the ROC on two grounds. The first, that the counterclaim was unmaintainable as it was not connected to the claim and had no bearing on it. Secondly, that the magistrate had no power to grant the declaratory relief sought by the first defendant in his counterclaim.

[8] The magistrate ruled that under O. 15 r. 2(1), a counterclaim can only be maintained if it was the same nature as the original action and allowed the application to strike out the counterclaim, and hence this appeal.

Discussion and Decision

[9] I shall first dispose of the objection that the counterclaim brought by the defendants was in contravention of O. 15 r. 2(1) of the ROC. Order 15, so far as is material, reads as follows:

> 2 (1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter: and where he does so he shall add the counterclaim to his defence.
>
> 5 (2) If it appears on the application of any party against whom a counterclaim is made that the subject matter of the counterclaim ought for any reason to be disposed of by a separate action, the court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient.

[10] A counterclaim is in substance a separate action. A reading of r. 2(1) shows that it permits a defendant to bring a counterclaim against any one or more of the plaintiffs in any action for any relief. It expressly provides that the subject matter of the counterclaim need not be of the same nature as the original action or even allied to it. Order 15 r. 3(1) specifically provides for the joinder as additional defendants to a counterclaim of persons who are not plaintiffs in the action.

[11] Order 15 r. 5(2) provides a safeguard against any misuse of this procedure by the bringing of multiple counterclaims. The overriding discretionary jurisdiction conferred by O. 15 r. 5(2), to which O. 15 rr. 2(1) and 3(1) are expressly made subject, affords the court the ultimate say in what should or should not proceed by way of counterclaim. If the court is of the view that the subject matter of the counterclaim ought to be disposed by a separate action, the court may disallow the inclusion of the counterclaim.

[12] Counsel for the defendants contended that under O. 15 r. 2(1) there is no limitation on the possible subject matter of a counterclaim that can be raised. The rationale being the avoidance of multiplicity of actions between the same parties. At such, the magistrate had erred in construing the provision to mean that it must be of the same nature as the original action or even allied to it. If indeed the legislature intended to limit the nature of the counterclaim that can be raised, r. 2(1) would not have been worded liberally.

[13] On the other hand, counsel for the plaintiff accepted that the provision did not impose any limitation but contended that the courts have always exercised their discretion under r. 5(2) to strike out a counterclaim, or to

order separate trials, in cases where the counterclaim is not connected or has any bearing to the claim. He argued that consequently, I ought to exercise my discretion in one or other of those ways in relation to the counterclaims brought by the defendants.

[14] There is considerable amount of case law on the interpretation of O. 15 r. 2(1) of the ROC. I refer to three. The first is *Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd* [1972] 1 LNS 31; [1972] 1 MLJ 168, where Raja Azlan Shah J (as His Royal Highness then was) stated at p. 170:

> ... I disallowed the counterclaim to form part of the principal claim for the following reasons. It is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principal claim as to make it necessary in the interest of justice that it should be dealt with along with the claim. Thus a counterclaim for slander cannot be maintained in a claim for money lent. (See, *High Commissioner for India v. Ghosh* [1959] 3 WLR 811). In *Shanghai Hall Ltd v. Townhouse Hotel Ltd* [1967] 1 MLJ 223 I have detailed the various factors which, by no means exhaustive, may influence a judge in the exercise of his discretion under Order 21 rule 15. In the present case the subject matter of the counterclaim is for alleged libel of the defendants' business. I am at a loss to see how the subject matter of the counterclaim has any material affinity at all upon the subject matter of the claim which is a claim for the price of fuel supplied. I therefore ordered the counterclaim to form the subject matter of a separate action.

[15] In the next case, *Alloy Consolidated Sdn Bhd Anor v. Anjaria Properties Sdn Bhd & Anor And Another Appeal* [2011] 5 CLJ 720; [2009] 4 MLJ 833, the Court of Appeal reaffirmed this principle:

> So, clearly, the counterclaim added by application in encl. 38 was based on the same facts as pleaded in the original statement of defence of the first respondent. In this connection, reference must be made again to O. 15 r. 1(2) of the RHC which allows a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and howsoever arising), instead of bringing a separate action, to make a counterclaim in respect of that matter and where he does so he must add the counterclaim to his defence. However, it is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principle claim as to make it necessary in the interest of justice that it should be dealt with along with the claim. Thus a counterclaim for slander cannot be maintained in a claim for money lent (see *Esso Standard Malaya Bhd v. Southern Cross Airways (M) Bhd* [1972] 1 LNS 31; [1972] 1 MLJ 168 at p. 170, per Raja Azlan Shah J as His Royal Highness then was).

[16] In *Tetuan LM Ong & Co v. Chia Kah Gek* [2010] 6 CLJ 268; [2009] MLJU 1093, the plaintiff was the administrator of the estate of her deceased parents. She sold two parcels of land that were estate property to the second

A defendant. She sought declaratory relief in the High Court that a clause in the sale purchase agreement providing for the retention of the sale proceeds by the first defendant, a firm of advocates and solicitors, was of no further effect and for the release of, *inter alia*, the sale proceeds to her. The first defendant filed a defence and counterclaim for defamation alleging that the plaintiff had
B falsely and/or maliciously defamed them in relation to their refusal to release the sale proceeds to her. The plaintiff then took out an application pursuant to O. 14A of the Rules of the High Court 1980 for the determination of a point of law on whether the defendant's counterclaim was maintainable in law.

C **[17]** The Registrar answered the above question in the negative and dismissed the counterclaim. On appeal to the Judge in Chambers, the High Court Judge affirmed the decision of the Registrar, and the first defendant appealed. In dismissing the appeal, Sulong Matjeraie, JCA held:

> D As a rule, counterclaim must be sufficiently connected with the claim. Material affinity with the subject matter of the claim must be present in the counterclaim for defamation cannot be maintained in an action for a claim for a declaration that the clause in the sale and purchase agreement providing for the retention of the sale proceeds by a stakeholder was of no effect.
>
> E In this respect, it is pertinent to quote with our full agreement on what Raja Azlan Shah, J (as His Majesty then was) said in *Esso Standard Malaysia v. Southern Cross Airways (Malaysia) Bhd* [1972] 1 LNS 31; [1972] 1 MLJ 168 at p 170:

[18] The cases illustrate that the discretionary power to limit use of the
F counterclaim is invoked in cases where it is procedurally inconvenient or inexpedient to try all the causes of action together. In the exercise of such discretion, the absence of mutuality is a weighty factor in favour of striking out the counterclaim in order to protect the plaintiff from the over-complication of the litigation and the ensuing delay.

G **[19]** The counterclaim of the first and second defendant do, in my view, fall within O. 15 r. 2(1), but is subject to the exercise by the court of its jurisdiction under r. 5(2). If the present counterclaim is allowed to stand, there will be counterclaim against the plaintiff by the defendants, which has no connection with the original action. The area of dispute between the
H parties would be greatly enlarged and has the prospect of making these proceedings complicated, and therefore increasing the length of the hearing. The enlargement of the scope of the proceedings in these various ways is clearly undesirable and is an important objection to allowing the counterclaim to stand.

I **[20]** Accordingly, I am of opinion that the two counterclaim of the first and second defendants ought not to be maintained unless it is shown to be, as regards the relief it claims, sufficiently connected with or allied to the

subject-matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. The defendants have said all that could possibly be said in support of their contention, but I am at a loss to see how the subject matter of the counterclaim, which is a claim in respect of a motor vehicle and unpaid salary have any material bearing at all on the subject matter of the claim, which is simply a claim for money lent.

Civil Jurisdiction Of Magistrate

[21] Turning to the second objection of the plaintiff that a magistrate court has no jurisdiction to grant declaratory relief. The relevant provisions in the Subordinate Courts Act 1948 are:

> s. 65(5) A Sessions Court may, in respect of any action or suit within the jurisdiction of the Sessions Court, in any proceedings before it:
>
> (a) grant an injunction; and
>
> (b) make a declaration,
>
> whether or not any other relief, redress or remedy is or could be claimed.
>
> s.90 Subject to the limitations contained in this Act, a First Class Magistrate shall have jurisdiction to try all actions and suits of a civil nature where the amount in dispute or value of the subject matter does not exceed one hundred thousand ringgit.

[22] Section 90 clearly illustrates that the plaintiff is correct in the position she takes as regards the jurisdiction of a first class magistrate to grant declaratory relief. It is only a sessions judge who is empowered to grant declaratory relief.

Conclusion

[23] For the reasons given, the appeal is allowed with costs of RM1,000 to the plaintiff.